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Supreme Court of the United States

October Term, 1929

No. 23

CHARLES H. STANGE, Petitioner,

v.

THE UNITED STATES, Respondent.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI

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(273 U. S. 346), and the Benjamin Russell case (278 U. S. 181), and numerous decisions of the Board of Tax Appeals, such as those rendered in the cases of American Powder Mills, 12 B. T. A. 305 and Chicago Insulated Wire and Manufacturing Company, 10 B. T. A. 1195 10

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Uncertainty now exists in the minds of taxpayers and officials regarding the rules to be applied in determining the validity or invalidity of waivers. That such uncertainty extends to the Congress of the United States is inferable from the enactment of Section 506 of the Revenue Act of 1928. In fact, that section undoubtedly contemplates that an authoritative ruling shall be made by the Courts on the question of the validity of waivers given after the expiration of the statutory period of limitation. We respectfully suggest that, as conflict in the decisions of the Courts immediately subordinate to this Court, on this question, now exists, only by a decision of this Court of the question may an authoritative ruling be secured..... 20

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Supreme Court of the United States

October Term, 1929

No. 554

CHARLES H. STANGE, Petitioner,

v.

THE UNITED STATES, Respondent.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

We take the liberty of making the following suggestions in support of the petition for a writ of certiorari, in the present case.

Opinion of the Court Below

The opinion of the Court below was rendered by the Court of Claims on November 4, 1929, in the action of this petitioner against the United States, No. F-261 of the records of that Court. Such opinion has not yet been printed in the official reports, but is a part of the record on this appeal. (Record, pp. 26-35.)

Jurisdiction

(a) The jurisdiction of this Court under Section 288 of the Judicial Code is invoked. (28 U. S. C. A. 129.) Subdivision (b) of that section is as follows:

> "In any case in the Court of Claims, including those begun under Section 287, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal."

(b) The date of the decree of the Court of Claims, sought to be reviewed, is November 4, 1929. (Record, p. 35.) The petition for certiorari was filed on January 3, 1930.

(c) This is an action filed in the Court of Claims by petitioner against the United States, for the recovery of income taxes erroneously and illegally collected from him for the calendar year 1914. (Record, p. 7.)

(d) In the case of *Sun Shipbuilding Company* v. *United States*, 271 U. S. 96, the jurisdiction of this Court to review decisions of the Court of Claims, in certiorari proceedings, upon a showing of merit, was recognized.

Statement of Case

We adopt as a statement of the present case the Summary of Matters involved and the statement of the Reasons Relied on for the Allowance of the Writ of Certiorari, appearing in the Petition for Writ of Certiorari. (Record, pp. 1-6.)

Specifications of Errors

The Court below erred in finding and holding against petitioner on each of his contentions advanced in that Court, viz.:

1. The present case falls within the principle of the decision of this Court in *Lynch* v. *Turrish*, 247 U. S. 221, rather than that of *Lynch* v. *Hornby*, 247 U. S. 339. There is, therefore, no taxable element in the present case.

If, however, it be held that the transaction, consisting of the several steps taken by or at the direction of Mr. A. H. Stange, is a taxable one, it was urged that the amount of income taxable to all stockholders of the Stange Company may not exceed the amount of the accumulated realized profits of that company. As stated in the VI Finding of Facts, this amount was $982,227.93, exclusive of unrealized appreciation. The maximum amount taxable to petitioner, upon the application of this principle, would be one-seventh of this amount or $140,318.27.

2. The power *to assess* the alleged deficiency for 1914 expired long prior to February, 1924, when the additional assessment was made. This power could not be and was not revived by the waiver signed by plaintiff and the Commissioner of Internal Revenue in November, 1922, after the bar of the statute had fallen.

No collection waiver was ever given by petitioner. The power *to collect* the alleged deficiency expired long prior to March 19, 1925, the date on which collection was enforced. No liability existed at that time.

3. The several steps taken by Mr. A. H. Stange and the corporations controlled by him (A. H. Stange Company, Union Land Company, and Kinzel Lumber Company) constitute one transaction, which is a *non-taxable gift* from father to son. When so considered, the credits raised by the two new companies on their books in favor of petitioner are non-taxable to the extent of 237/357ths thereof. Nevertheless, the Commissioner held that the amount of the credits was a taxable dividend to the extent of 100 percent thereof.

4. The Commissioner of Internal Revenue *overstated the amount taxable* to petitioner, even though the transaction be regarded as taxable in its entirety.

ARGUMENT

Summary of Argument

As grounds for the issuance of the writ of certiorari in the present case, petitioner submits the following summary:

(a) The decision of the Court of Claims now sought to be reviewed on the validity of the assessment waiver given after the bar of the statute of limitations had become effective, is

in direct conflict with the decision of the D. C. Court of Appeals in the Joy Floral Company case, 29 Fed. (2d) 865. In fact, this conflict is expressly recognized in the last paragraph but one of the decision of the Court of Claims in the present case. These two Courts are immediately subordinate to this Court. The Court of Appeals of the District of Columbia has, in certain cases, concurrent jurisdiction with the several Circuit Courts of Appeal, of appeals in tax cases from decisions of the Board of Tax Appeals. (Section 1002 of the Revenue Act of 1926.)

(b) The decision of the Court below that the assessment waiver served to confer upon the Commissioner of Internal Revenue not only the power *to assess* but also the power to collect is in conflict with the underlying principle of decisions of this Court in the New York & Albany Lighterage Company case (273 U. S. 346), and the Benjamin Russell case (278 U. S. 181), and numerous decisions of the Board of Tax Appeals, such as those rendered in the cases of American Powder Mills, 12 B. T. A. 305 and Chicago Insulated Wire and Manufacturing Company, 10 B. T. A. 1195.

(c) The ruling of the lower Court that as a result of the steps outlined in the findings of fact petitioner received a taxable dividend in the amount of $642,138.40, is in conflict with the decisions of this Court in *Mobile and Ohio Railroad Company* v. *Tennessee*, 153 U. S. 486 and *Lynch* v. *Turrish*, 247 U. S. 221, and with the implication of the decisions of this Court in the Lynch-Hornby case, 247 U. S. 339, the Phellis case, 257 U. S. 156, and the Rockefeller case, 257 U. S. 176. Each of these cases, except the Mobile and Ohio case, arose under the Revenue Act of 1913.

(d) The present case involves questions of general public interest. Thousands of waivers have been given by taxpayers. These waivers differ in the language they contain. Many of them relate to assessment, only. Some were given before and others after the expiration of the statutory periods. A conflict of authority regarding the validity and effect of these waivers has been created by the decision of the Court of Claims in petitioner's case. The Court of Claims is a Court of first instance and its judgments are reviewable only by this Court.

Uncertainty now exists in the minds of taxpayers and officials regarding the rules to be applied in determining the validity or invalidity of waivers. That such uncertainty extends to the Congress of the United States is inferable from the enactment of Section 506 of the Revenue Act of 1928. In fact, that section undoubtedly contemplates that an authoritative ruling shall be made by the Courts on the question of the validity of waivers given after the expiration of the statutory period of limitation. We respectfully suggest that, as conflict in the decisions of the Courts immediately subordinate to this Court, on this question, now exists, only by a decision of this Court of the question may an authoritative ruling be secured.

These will be discussed in the order stated.

THE DECISION OF THE COURT OF CLAIMS NOW SOUGHT TO BE REVIEWED ON THE VALIDITY OF THE ASSESSMENT WAIVER GIVEN AFTER THE BAR OF THE STATUTE OF LIMITATIONS HAD BECOME EFFECTIVE, IS IN DIRECT CONFLICT WITH THE DECISION OF THE D. C. COURT OF APPEALS IN THE JOY FLORAL COMPANY CASE, 29 FED. (2d) 865. IN FACT, THIS CONFLICT IS EXPRESSLY RECOGNIZED IN THE LAST PARAGRAPH BUT ONE OF THE DECISION OF THE COURT OF CLAIMS IN THE PRESENT CASE. THESE TWO COURTS ARE IMMEDIATELY SUBORDINATE TO THIS COURT. THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA HAS, IN CERTAIN CASES, CONCURRENT JURISDICTION WITH THE SEVERAL CIRCUIT COURTS OF APPEAL, OF APPEALS IN TAX CASES FROM DECISIONS OF THE BOARD OF TAX APPEALS. (SECTION 1002 OF THE REVENUE ACT OF 1926.)

The decision of the D. C. Court of Appeals in the Joy Floral Company case, 29 Fed. (2d) 865, was rendered on the appeal of that company from a decision of the Board of Tax Appeals. The decision of the lower tribunal was to the effect that the waiver was valid even though given after the bar of the statute had fallen. That decision was reversed by the Appellate Court.

Declining to follow the decision of the District Court of Appeals, the Court of Claims in the present case, referring

to the Joy Floral case, said: "In our opinion the decision of the Board of Tax Appeals is supported by the better reasoning * * *."

No clearer conflict of decision by Courts subordinate to this Court could be found.

It is worth noting, also, that the decision of the D. C. Court of Appeals in the Joy Floral Company case was cited and followed by the U. S. District Court for Western District of Pennsylvania in the case of *Spear & Company* v. *Heiner*, 34 Fed. (2d) 795, decided June 5, 1929.

THE DECISION OF THE COURT BELOW THAT THE ASSESSMENT WAIVER SERVED TO CONFER UPON THE COMMISSIONER OF INTERNAL REVENUE NOT ONLY THE POWER *TO ASSESS* BUT ALSO THE POWER TO COLLECT IS IN CONFLICT WITH THE UNDERLYING PRINCIPLE OF DECISIONS OF THIS COURT IN THE NEW YORK & ALBANY LIGHTERAGE COMPANY CASE (273 U. S. 346), AND THE BENJAMIN RUSSELL CASE (278 U. S. 181), AND NUMEROUS DECISIONS OF THE BOARD OF TAX APPEALS, SUCH AS THOSE RENDERED IN THE CASES OF AMERICAN POWDER MILLS, 12 B. T. A. 305, AND CHICAGO INSULATED WIRE AND MANUFACTURING COMPANY, 10 B. T. A. 1195.

In the decisions of the Board of Tax Appeals, cited above, the tax was assessed under a waiver of the exact form relied upon by the Commissioner of Internal Revenue in the present case. There, as here, no *collection* waiver was given. The Board held in each case that collection was barred by the statute. In the Chicago Insulated Wire and Manufacturing Company case, the Board of Tax Appeals held:

> "The written consent entered into between petitioner and the Commissioner expired April 1, 1924. The Commissioner made the assessment on March 25, 1924, which was within the period agreed upon. The amount assessed and now claimed by the Commissioner has never been collected. Since the five-year period within which the Commissioner might collect any amount from the taxpayer as a tax expired under the statute and the consent before the passage of the Revenue Act of 1924, collection of the proposed deficiency is now barred by the statute of

limitations. *Ocean Accident & Guarantee Corporation, Ltd.*, 6 B. T. A. 1045; *Theodore H. Wickwire, Jr., et al., Executors*, 10 B. T. A. 102; *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346."

The material facts of petitioner's case are identical with those of the cited case. In the latter case, the Board of Tax Appeals held that the right of *collection* was barred by the statute, even though the tax was assessed within the time specified in the waiver. A contrary ruling was made in petitioner's case by the court below.

The decision of the Court of Claims in the present case holds that when, by the waiver, petitioner waived the statute of limitations upon the power *to assess*, he thereby, without more, waived the limitation upon the power to collect. The Revenue Acts, however, contain separate and independent provisions relating to the two powers. In all acts, there is a limitation period for assessment and a separate period for collection. In some of the acts the two periods run concurrently and in others consecutively; but in all acts the separate character of each period is recognized. Section 250(d) of the Revenue Act of 1918, Section 250(d) of the Revenue Act of 1921, Sections 277 and 278 of the Revenue Act of 1924, Sections 277 and 278 of the Revenue Act of 1926.

The applicable provisions of the Revenue Act of 1921 are contained in Section 250(d) of that Act, from which we quote (42 Stats. at L. 227-265):

> "The amount of income, excess-profits or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the tax-

payer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts or of any taxes due under Section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

If effect is to be given these provisions of the Acts, the two things—the power to assess and the power to collect—must not be confused with each other. This being true, we are led to the question of whether both powers are within the scope of the language of the waiver, the document relied upon by respondent.

The waiver provides that petitioner "hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered." Nothing could be clearer than that the "statutory provisions" to which the waiver refers are those only which relate to the period of assessment. No effort was made in the Court below to vary the terms of the waiver by a plea or evidence of fraud or mistake.

It will be conceded, we assume, that the assessment made under the waiver can have no greater efficacy than an assessment made under the statute within the statutory period. Assuming its validity for the moment, we premise that the incidents of the assessment made in the present case under the waiver in 1922 are no more and no less than the incidents of an assessment that might have been made before the end of the statutory period.

In the Lighterage case, 273 U. S. 346, the question for decision was stated in the opinion to be:

> "Where under the tax laws enacted prior to the Revenue Act of 1921, income and excess profits taxes were assessed within five years after filing return, does Section 250(d) of that Act bar collection by distraint proceedings begun after the expiration of the five-year period?"

This question was answered by the Court in the affirmative. One of the principles necessarily established by the decision was that power to collect was not one of the incidents of an assessment seasonably made. If, then, the incidents of an assessment made under a waiver are the same as those of an assessment made under the statute, the conclusion is inevitable that, under the principle of the Lighterage decision, the power *to collect* is not one of the incidents of the power to assess conferred by waiver.

The same principle runs through the decision of this Court in the Benjamin Russell case, 278 U. S. 181.

That there is conflict between the opinions of this Court in the Lighterage and Russell cases and the opinion below, is apparent from a consideration of the following excerpt from the latter opinion:

> "It should be said also that the words 'assess' and 'assessment,' when used with reference to taxes, often include the collection thereof as a necessary sequence. In fact the term 'assess' is used at times to include all the steps involved in imposing a tax on property (*Allen* v. *McKay*, 120 Cal. 332), and 'to assess' often means to levy a tax (see cases cited under note 76, 5 C. J. 813), the two words being used with practically the same meaning, Idem. 76(b), and the words 'to levy' always include the collection of a tax."

In the opinions of this Court in the Lighterage and Russell cases, the exercise seasonably of the power to assess was not regarded as conferring the power to collect, "as a necessary sequence."

The rule on this subject in each jurisdiction must be determined in the light of its own statute law; and decisions of California or other State Courts based upon local statutes do not assist us in construing the Federal income tax acts where there is no merger of the two powers.

THE RULING OF THE LOWER COURT THAT AS A RESULT OF THE STEPS OUTLINED IN THE FINDINGS OF FACT PETITIONER RECEIVED A TAXABLE DIVIDEND IN THE AMOUNT OF $642,138.40, IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN

MOBILE AND OHIO RAILROAD COMPANY V. TENNESSEE, 153 U. S. 486 AND LYNCH V. TURRISH, 247 U. S. 221, AND WITH THE IMPLICATION OF THE DECISIONS OF THIS COURT IN THE LYNCH-HORNBY CASE, 247 U. S. 339, THE PHELLIS CASE, 257 U. S. 156, AND THE ROCKEFELLER CASE, 257 U. S. 176. EACH OF THESE CASES, EXCEPT THE MOBILE AND OHIO CASE, AROSE UNDER THE REVENUE ACT OF 1913.

The accumulated surplus or undivided profits of the Stange Company immediately before the transfer of assets to the two new companies, exclusive of unrealized appreciation of timbered lands, was $982,227.93. (VI Findings of Fact.) If we assume the entire amount thereof was distributed to its stockholders, petitioner's share thereof could not exceed $140,318.27. The other two companies had no surplus or undivided profits.

Respondent's theory accepted by the lower Court is that a *taxable dividend* was received by petitioner, i. e., that the distribution here involved constituted a *dividend*, within the meaning of that term in the Revenue Act in the amount of $642,138.40.

The Revenue Act here involved is that of 1913. It contains this provision (Section B):

> "That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever."

As said by the Supreme Court in the Phellis case, relative to the above quoted language:

> "Disregarding the slight looseness of construction, we interpret 'gains, profits, and income derived *from* * * *

dividends', etc., as meaning not that everything in the form of a dividend must be treated as income, but that income derived *in the way* of dividends shall be taxed. Hence the inquiry must be whether the shares of stock in the new company received by claimant as a dividend by reason of his ownership of stock in the old company constituted (to apply the tests laid down in *Eisner* v. *Macomber*, 252 U. S. 189, 207, 64 L. ed. 521, 528, 9 A. L. R. 1570, 40 Sup. Ct. Rep. 189) a gain derived from capital, not a gain accruing to capital, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital, however invested, and coming in, that is, received or drawn by the claimant for his separate use, benefit, and disposal."

(The above italics appear in the opinion.)

The technical as well as the ordinary meaning of the word "dividend" was clearly stated by this Court in *Mobile and Ohio Railroad Company* v. *Tennessee*, 153 U. S. 486, from which we quote:

> "The term 'dividend' in its technical as well as in its ordinary acceptation means that portion *of its profits* which the corporation, by its directory, sets apart for ratable division among its shareholders."

In each of the Revenue Acts beginning with the Revenue Act of 1916, some such definition of the term "dividend" as the following appears:

> "The term 'dividend' * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913."

We see, therefore, that for 1916 and subsequent years two elements are required to make corporate distributions taxable dividends, viz:

1. It must be made out of earnings or profits; and
2. It must be made out of earnings or profits accumulated since March 1, 1913.

The second of these elements is required solely by reason of the provision of the statutory definition; and in the absence

of such a provision, this element does not enter into the definition. The first requirement above, however, is but a repetition in the statute of both the technical and ordinary meaning of the term. (Mobile and Ohio Railroad-Tennessee case supra.) It, therefore, is to be applied in the construction of the term as used in the Revenue Act of 1913, even though the statutory definition be omitted from that Act.

We conclude broadly that no corporate distribution is to be regarded as a taxable dividend unless it be made out of earnings or profits of the distributing corporation.

But should unrealized appreciation be regarded as "earnings or profits" within the meaning of the definition? The answer to this question will be taken from the opinions of this Court, upon a consideration of the four corners of the Revenue Acts.

Under none of the Revenue Acts enacted since the Income Tax Amendment became effective has unrealized appreciation been treated as "earnings or profits."

That unrealized appreciation should not be so regarded was the ruling of this Court in the La Belle Iron Works case, 256 U. S. 377. In that case it was held that unrealized appreciation was not included in the terms, "paid in or earned surplus and undivided profits," appearing in Section 207 of the Revenue Act of 1917.

The accepted construction of the several Revenue Acts was approved by this Court in the Phellis case, in differentiating a taxable from a non-taxable distribution. The Court said:

> "Hence the inquiry must be whether the shares of stock * * * constituted a gain derived from capital, not a gain accruing to capital, *nor a growth or increment of value in the investment*, but a gain, a profit. * * *"

In the Lynch-Turrish case, 247 U. S. 221, this Court, quoting with approval from the earlier case of *Gray* v. *Darlington*, 15 Wall. 63, laid down this rule:

> "The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of the tax on the amount of the advance. Mere advance in value in no sense constitutes

the gains, profits, or income specified by the statute. It constitutes and can be treated merely as increase of capital."

Let us consider for a moment whether this Court has ever classified as a taxable dividend any corporate distribution that was not made out of earnings or profits theretofore *realized* by the distributing corporation.

The Lynch-Turrish decision involved a complete liquidation of the distributing company, but much of the reasoning of the decision is equally applicable here. The Court ascertained, first, the basis of the decisions of the lower Courts in favor of the taxpayer and then approved the reasoning of the lower Courts. Quoting from the opinion of this Court:

> "The District Court and the Circuit Court of Appeals decided that the amount so distributed to Turrish was not income within the meaning of the statute, basing the decision on two propositions, as expressed in the opinion of the Circuit Court of Appeals, by Sanborn, Circuit Judge; (a) The amount was the realization of an investment made some years before, representing its gradual increase during those years, and which reached its height before the effective date of the law, that is, before March 1, 1913, and the mere change of form of the property 'as from real to personal property or from stock to cash,' was not income to its holders because the value of the property was the same after as before the change; (b) *the timber lands were the property, capital, and capital assets of their legal and equitable owner, and the enhancement of their value during a series of years 'prior to the effective date of an income tax law, although divided or distributed by dividend or otherwise subsequent to that date, does not become income, gains, or profits taxable under such an act.'* "

In the Lynch-Hornby case (247 U. S. 339) in which this Court held the distribution to be taxable, it appeared that of the total distribution ($650,000), "$240,000, or 24 percent of the par value of the capital stock, was derived from current earnings, and $410,000 from conversion into money of property that it owned or in which it had an interest on March 1,

1913." There was in the Lynch-Hornby case, also, a large element of appreciation accrued prior to March 1, 1913.

We recall here, first, that the Revenue Act of 1913 did not draw the line through March 1, 1913, to distinguish the taxable from the non-taxable. It was, therefore, not material, for purposes of the 1913 Act, that the distributed earnings accrued before that date. No claim is made in the present case that the distribution was non-taxable solely because it was made out of earnings or profits accrued prior to March 1, 1913.

We may lay to one side 24 percent of the distribution in the Lynch-Hornby case, i. e., the portion thereof which was made from current earnings. But, what of the remainder of the distribution?

It appears that it was made from a *conversion into money* of property owned on March 1, 1913. When appreciation is converted into money, it may no longer be regarded as *unrealized* but rather becomes *realized;* and it is *realized* appreciation that gives rise to "gains or profits" within the meaning of the Revenue Acts. No such realization appears in petitioner's case.

This Court had analogous questions before it in the Phellis (257 U. S. 156) and Rockefeller (257 U. S. 176) cases. In the latter case the corporation was engaged in producing and selling petroleum and in transporting it through its own pipe lines. The pipe line property was conveyed to a new corporation in consideration of its capital stock, which was then distributed to the shareholders of the old company, in proportion to their stockholdings. It was held that these steps gave rise to taxable income. The distribution was defined or classified by the Court as follows: "It was in substance and in effect, not merely in form, a *dividend of profits* by the corporation and individual income to the stockholder." No question of unrealized appreciation was involved in the Rockefeller case.

The decision in the Rockefeller case is based largely upon the decision in the Phellis case decided on the same day (November 21, 1921) by the Supreme Court. In fact, we regard the Phellis case as the leading case of the class to which it belongs. Some of the material facts of that case are stated in the syllabus as follows:

"With the concurrence of 90 percent of the stockholders of a corporation, a plan of reorganization was effected, pursuant to which a new corporation with an authorized capital stock nearly four times as great in par value as the aggregate stock and bonded indebtedness of the old was formed under the laws of a different State, all the assets of the old were transferred to the new, as a going concern, including the good will and a large surplus, and in consideration, the old corporation retained money enough to redeem part of its bonds and received (1) the new company's debenture stock of par value sufficient to redeem the remainder, retire its own preferred stock and leave in its treasury an amount equal in par value to its own outstanding common stock, and (2) the new company's common stock of par value double the amount of the old company's outstanding common stock, which the latter immediately distributed to its common stockholders as a dividend, paying them two shares of the new for each of the old. Upon completion of the transaction, October 1, 1915, the personnel of the stockholders and officers of the two corporations was identical, the stockholders having proportionate holdings in each; but less than one-half of the new company's authorized stock had been issued. Thereafter the old corporation continued as a going concern, but except for the redemption of its bonds and retirement of its preferred stock, and the holding of the debenture stock equal to its common, and collection and disposition of the dividends thereon, did no business."

No question of unrealized appreciation was involved.

The Court held the transaction to be taxable.

In the opinion the Court, referring to the original corporation, was careful to point out that:

"It had an excess of assets over liabilities showing a large surplus of *accumulated profits;* the precise amount is not important, *except that it should be stated that it was sufficient to cover the dividend distribution presently to be mentioned.*"

The fact that the distribution in the Phellis case came from accumulated profits is emphasized by the Court several times in the course of the opinion. We quote: "The common stock of the new company, after its transfer to the old company and prior to its distribution, constituted assets of the old company which it now held to represent its surplus of *accumulated profits* * * * the individual stockholders of the old company, including claimant, received assets of exchangeable and actual value severed from their capital interest in the old company, proceeding from it as the result of a division of former *corporate profits.*" "Where, as in this case, the dividend constitutes a distribution of *profits accumulated* during an extended period. * * *". "In short, the question whether a dividend *made out of company profits* constitutes income of the stockholder is not affected by antecedent transfers of the stock from hand to hand." Finally, the conclusion of the Court is stated as follows:

> "It thus appears that in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit, derived from his capital interest in the old company, not in liquidation of the capital *but in distribution of accumulated profits of the company;* something of exchangeable value produced by and proceeding from his investment therein, severed from it and drawn by him for his separate use."

THE PRESENT CASE INVOLVES QUESTIONS OF GENERAL PUBLIC INTEREST. THOUSANDS OF WAIVERS HAVE BEEN GIVEN BY TAXPAYERS. THESE WAIVERS DIFFER IN THE LANGUAGE THEY CONTAIN. MANY OF THEM RELATE TO ASSESSMENT, ONLY. SOME WERE GIVEN BEFORE AND OTHERS AFTER THE EXPIRATION OF THE STATUTORY PERIODS. A CONFLICT OF AUTHORITY REGARDING THE VALIDITY AND EFFECT OF THESE WAIVERS HAS BEEN CREATED BY THE DECISION OF THE COURT OF CLAIMS IN PETITIONER'S CASE. THE COURT OF CLAIMS IS A COURT OF FIRST INSTANCE AND ITS JUDGMENTS ARE REVIEWABLE ONLY BY THIS COURT.

UNCERTAINTY NOW EXISTS IN THE MINDS OF TAXPAYERS AND OFFICIALS REGARDING THE RULES TO BE APPLIED IN DETERMINING THE VALIDITY OR INVALIDITY OF WAIVERS. THAT SUCH UNCERTAINTY EXTENDS TO THE CONGRESS OF THE UNITED STATES IS INFERABLE FROM THE ENACTMENT OF SECTION 506 OF THE REVENUE ACT OF 1928. IN FACT, THAT SECTION UNDOUBTEDLY CONTEMPLATES THAT AN AUTHORITATIVE RULING SHALL BE MADE BY THE COURTS ON THE QUESTION OF THE VALIDITY OF WAIVERS GIVEN AFTER THE EXPIRATION OF THE STATUTORY PERIOD OF LIMITATION. WE RESPECTFULLY SUGGEST THAT, AS CONFLICT IN THE DECISIONS OF THE COURTS IMMEDIATELY SUBORDINATE TO THIS COURT, ON THIS QUESTION, NOW EXISTS, ONLY BY A DECISION OF THIS COURT OF THE QUESTION MAY AN AUTHORITATIVE RULING BE SECURED.

Section 506 of the Revenue Act of 1928 (45 Stats. at L. 870) contains these provisions:

> "(a) Section 278(c) and (d) of the Revenue Act of 1926 are amended to real as follows:
>
> "'(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.
>
> "'(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year

period. The period so agreed upon may be extended b
subsequent agreements in writing made before the e
piration of the period previously agreed upon.'

"(b) Section 278 of the Revenue Act of 1926 is furth
amended by adding at the end thereof a new subdivisi
to read as follows:

"'(f) Any agreement which would be within the pr
visions of subdivision (c) or (d) of this section but f
the fact that it was executed after the expiration of t
period of limitation extended by such agreement, sha
be valid and effective according to its terms if entere
into after the enactment of the Revenue Act of 1928 a
before January 1, 1929.'

"(c) The amendments made by this section to the Re
enue Act of 1926 shall not be construed as in any mann
affecting the validity of waivers made prior to the enac
ment of this Act, which shall be determined according
the law in existence at the time such waiver was filed

It will be seen at once that by the above Subdivisions (
and (d) of Section 278 of the 1926 Act, as amended, Congre
differentiated between waivers given before and those giv
after the expiration of the statutory period. Only those th
were given before such expiration were recognized as valid
the section.

The rule on this subject is accentuated by Subdivision (f
whose provisions are expressly limited to waivers given aft
the enactment of the 1928 Act (May 29, 1928) and befo
January 1, 1929.

This brings us to the closing subdivision of Section 506.

The determination of the validity of waivers given aft
the expiration of the statutory period but before the enac
ment of the Revenue Act of 1928—such as the waiver in t
present case—is left by the section to the Courts. Congres
in effect, said: "We will pass that question to the Courts f
solution."

Conflicting rulings of courts immediately subordinate
this Court have been the result of this submission.

What could be more appropriate than that an authoritati
ruling on the question should be made by this Court? Su

a ruling, we suggest, would not only remove the conflict of authority but would also constitute a complete response to the Congressional submission.

For these reasons we respectfully request the issuance of the writ of certiorari, in the present case.

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